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IN THE

Supreme Court of the United States

OCTOBER TERM 1952.

NO. 590

CHARLES C. KOCMOND, MATT KLARSCH, and ROBERT KLOTZ,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Petition for Writ of Certiorari.

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Charles C. Kocmond, Matt Klarsch and Robert Klotz, respectfully pray for a Writ of Certiorari to review the judgment of the United States Court of

Appeals for the Seventh Circuit entered on December 23, 1952, affirming the judgment of conviction of the United States District Court for the Northern District of Illinois, Eastern Division, for violation of certain sections of the Food and Drug Act. Petition for rehearing was denied on January 9, 1953.

The Opinion Below.

The Court of Appeals for the Seventh Circuit affirmed the judgment and sentence of each petitioner for a term of nine months imprisonment and a fine of $750.

The opinion of the Court of Appeals, (R. 128-132) has not been officially reported.

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented.

1. Are the petitioners guilty of violating Section 331(k) prohibiting the misbranding of a food while it is held for sale where the evidence showed that the government entered into a stipulation at the trial that the horsemeat in question was properly labeled while it was held for sale, (R. 15-16), and where the evidence showed that the alleged misbranding took place after the sale?

2. Does Section 343(e)(1) which requires food in a package form to bear the name and place of business of manufacturer, packer or distributor—without stating whether it refers to subsequent distributor—apply to petitioners who were subsequent distributors of packers?

3. Are the petitioners guilty of violating Section 343 which prohibits false and misleading labeling of food, if the said food is properly labeled as horsemeat while it is

held for sale, and after the sale is completed, the petitioners mark the barrels of horsemeat "chucks" and "chunks" at the request of the purchaser who knew it was horsemeat?

4. Are the petitioners guilty of violating Section 343(i) (1) which requires that food bear the common or the usual name, for labeling the barrels of horsemeat as "chucks" and "chunks" when the petitioners bought the products as horsemeat under these names?

5. Are the petitioners guilty of misbranding when at the request of the purchaser they removed the stencils on the barrels bearing the label "horsemeat", in accordance with the Code of Federal Regulations Act, Title 9, Chapter 1. Section 17:10 which provides that all stencils, marks, and labels on previously used containers shall be removed before such containers are used again?

Statutes and Regulations Involved.

The pertinent portion of the Food and Drug Act and the Code of Federal Regulations Act are set out in the appendix.

STATEMENT.

The criminal information charged the petitioners as follows:

(1) the petitioners received a number of barrels containing horsemeat which had been shipped in interstate commerce and which they repacked and marked as "chucks", "shanks" and "lake shanks", and these designations on the barrels suggested that the food was beef; (2) the food failed to bear the common name of the food, to-wit, "horsemeat"; (3) the barrels of horsemeat failed to bear the name and place of business of the manufacturer, packer, or distributor.

A jury found the three petitioners guilty whereupon judgment was entered, imposing upon each petitioner a term of nine months imprisonment and a fine of seven hundred and fifty dollars.

At the commencement of the trial the government and the petitioners entered into a stipulation that the petitioners received a number of barrels containing horsemeat in an interstate shipment and that while they were held for sale they were properly labeled to show the original packer; and that the barrels contained horsemeat. (R. 15, 16)

An inspector for the United States Food and Drug Administration visited the premises of the petitioners who were openly engaged in operating a wholesale and retail business selling dog food, harnesses, and packages of horsemeat. The petitioners gave the government inspector permission to make an inspection of their place of business and showed him their books, records, and invoices and escorted him through their plant. (R. 18) The inspector found that the petitioners were working on an order for several barrels of horsemeat which had been sold to the Lake County Packing Company, Lake Zurich, Illinois, (R. 20) He saw an employe of the petitioners removing a stencil reading "horsemeat" from the barrels and these same barrels were marked as "chucks" and "chunks". He saw two of the petitioners trimming fat from the horsemeat, which was done at the request of the purchaser, thereby removing the government stamp on some of the pieces. (R. 20)

The government called three witnesses, only one of whom was familiar with the horsemeat trade, who testified that the terms "chucks" and "chunks", without any qualification, generally referred to beef.

The petitioner, Kocmond, testified that the common name of certain cuts of horsemeat were known to him as "chucks" and "chunks" (R. 67) The invoices from Jamestown Packing Company to the petitioners described the cuts of horsemeat as "chunks" (R. 102) and "chucks" (R. 103). The petitioner, Klotz, also testified that each piece of horsemeat was marked "horsemeat" several times on the lean portions with an electric iron. (R. 70)

The District Court in overruling the motion for a new trial said that he was not concerned with the names of the cuts (R. 112). The court refused to grant a new trial because the word "horsemeat" was removed from the barrels and in some cases the markings were taken off the horsemeat. (R. 112)

Specifications Of Errors To Be Urged.

The Court of Appeals erred:

1. In holding that the petitioners who were subsequent distributors were required to place a label on the package with the name of the packer and place of business when section 343(e)(1) does not require the subsequent distributor to affix such label.

2. In holding that the petitioners violated section 331(k) when it appears by the stipulation and the evidence that the alleged misbranding took place while the food was not held for sale.

3. In holding that the petitioners misbranded the articles of food by removing the labels on the barrels, and in failing to consider that the Code of Federal Regulations Act, Title 9, Chapter 1, Section 17:10, required the petitioners to remove all stencils and labels before the containers could be used again.

4. In holding that the petitioners were guilty of misbranding the articles of food by marking the barrels of horsemeat as "chucks" and "chunks" when it appears from the evidence that the purchaser knew he was buying horsemeat and that the words "chucks" and "chunks" were used in the original invoice to the petitioners.

5. In holding that although the horsemeat was properly labeled as such before the sale and the purchaser knew he was buying horsemeat, the removal of the word "horsemeat" in stencils on the barrels and the stamp of horsemeat on some of the pieces of horsemeat constituted a misbranding of food under the Food and Drug Act.

6. In holding the petitioners guilty of misbranding of food when the record does not show that the purchaser was not the ultimate purchaser and when the record clearly shows that he was fully aware that he was buying horsemeat and not beef.

7. In affirming the District Court.

Reasons For Granting The Writ.

It is important that this court construe Section 343(e)(1) which requires that food in a package form shall bear a label containing the name and address of the manufacturer, packer or distributor. The Court of Appeals failed to pass on our contention that this section does not apply to subsequent manufacturers, distributors and packers. It is essential that every manufacturer, packer or distributor be informed of the construction of this section so that they may know as subsequent manufacturers, packers or distributors of packages of food that they are required to label each package with their name and place of business.

The opinion of the Court of Appeals holding that the removing of labels from the barrels constitutes a misbranding is contrary to the Code of Federal Regulations Act, Title 9, Chapter 1, Section 17:10, which provides that all stencils and labels be removed before reuse. The conflict between the holding of the Court of Appeals and the Code of Federal Regulations Act requires an interpretation by this Court.

The decision of the Court of Appeals in holding that the petitioners are guilty of violating Section 331(k) is contrary to the decisions of this court which hold that this section is limited to cases where the food is held for sale. (*Cordell* v. *U.S.*, 335 U.S. 345; 69 S.Ct. 106) The stipulation entered into between the government and the petitioners conclusively established the fact that the food was not misbranded while it was held for sale.

The Court of Appeals overlooked the contention of the petitioners that the District Court considered matters outside of the evidence as a basis for refusing the petitioners a new trial. The District Court stated, "They wanted to sell horse meat and the purchaser wanted to buy horsemeat, no doubt about that. And they both wanted it to be in condition so that they could sell it later to somebody as beef, so they misbranded it." It was improper for

the District Court to consider matters not in evidence in passing on the motion for a new trial and there is no doubt that this was a factor in determining the punishment.

CONCLUSION.

For the reasons stated, this petition for writ of certiorari should be granted.

Respectfully submitted,

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Attorney for petitioners.

APPENDIX.

Section 331(k), Title 21, United States Code, provides:

The following acts and the causing thereof are hereby prohibited:

The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded.

Section 343, Title 21, United States Code, provided:
Misbranded food

"(a) If its labeling is false or misleading in any particular."

Section 343(e)(1), Title 21, United States Code, provides:

If in package form unless it bears a label containing (1) the name and place of business of the manufacturer, packer or distributor.

Section 343(i)(1), Title 21, United States Code, provides:

If it is not subject to the provisions of paragraph (g) of this section unless it bears (1) the common or usual name of the food if any there be.

Title 9, Chap 1, Section 17:10, Code of Federal Regulations Act provides:

(a) No inspection legend which has been previously used shall be used again for the identification of any product, except as provided for in paragraph (b) of this section.

(b) All stencils, marks, labels, or other devises on previously used containers whether relating to any product or otherwise, shall be removed or obliterated before such containers are used for any product, unless such stencils, marks, labels, or devises correctly indicate the article to be packed therein and such containers are refilled under the supervision of a division employe.

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In the Supreme Court of the United States

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CHARLES C. KOCMOND, MATT KLARSCH, AND ROBERT KLOTZ, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 128-132) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 23, 1952 (R. 133), and a petition for rehearing was denied on January 9, 1953 (R. 134). The petition for a writ of certiorari was filed on February 6, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether, within the meaning of Section 301(k) of the Federal Food, Drug, and Cosmetic Act, the horsemeat which petitioners misbranded was being held for sale, where the meat had not been delivered to the purchaser, although the technical sale to a packing company had been completed.

2. Whether Section 403(e)(1) of that act, which requires food in package form to bear a label containing the name and address of the manufacturer, packer or distributor, is applicable to a distribution of the food subsequent to the first distribution.

3. Whether intent to defraud is an element of the misbranding misdemeanor defined by sections 301 and 403 of the Federal Food, Drug, and Cosmetic Act.

4. Whether petitioners' conviction for misbranding, based on the removal of all references to horsemeat from the containers and the relabeling of them as "leg shanks," "chucks" or "chunks," is inconsistent with an administrative regulation (Section 17.10, Title 9, Fed. Code of Reg.), which provides that no federal inspection marks on containers which have been once used shall be used again unless they correctly indicate the article to be packed therein and the containers are refilled under the supervision of an employee of the Bureau of Animal Industry, U. S. Department of Agriculture.

STATUTE INVOLVED

The Federal Food, Drug, and Cosmetic Act, 52 Stat. 1040, as amended by Act of June 24, 1948,

62 Stat. 582, 21 U. S. C. 301, *et seq.*, provides in part:

> Sec. 301. The following acts and the causing thereof are hereby prohibited:
>
> * * * * *
>
> (k) The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded.
>
> Sec. 303. (a) Any person who violates any of the provisions of section 301 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than $1,000 or both such imprisonment and fine; * * *.
>
> (b) Notwithstanding the provisions of subsection (a) of this section, in case of a violation of any of the provisions of section 301, with intent to defraud or mislead, the penalty shall be imprisonment for not more than three years, or a fine of not more than $10,000, or both such imprisonment and fine.
>
> Sec. 403. A food shall be deemed to be misbranded—
>
> (a) If its labeling is false or misleading in any particular.
>
> * * * * *

(e) If in package form unless it bears a label containing (1) the name and place of business of the manufacturer, packer, or distributor; * * *

* * * * *

(i) * * * unless its label bears (1) the common or usual name of the food * * *.

STATEMENT

On July 2, 1952, a criminal information was filed in the District Court for the Northern District of Illinois charging petitioners and two partnerships which they owned—K & S Dog Food and Metropolitan Distributing Company—with violation of the misbranding provisions of the Federal Food, Drug and Cosmetic Act, sections 301(k) and 403 (a), (e)(1) and (i)(1), *supra* (R. 3-5). The evidence adduced at the trial disclosed that during the period from June 1, 1950, to July 30, 1950, the petitioners were conducting a business at 6914 W. Roosevelt Road, Oak Park, Illinois, under two partnership arrangements, the K & S Dog Food, and the Metropolitan Distributing Company (R. 15-16). On June 22 and June 27, 1950, the K & S Dog Food received a number of barrels containing horsemeat from the Jamestown Packing Company, Jamestown, North Dakota (R. 16). The burlap cover on each barrel was labeled "Jamestown Packing Company Boneless Horsemeat" (R. 16, 99). Stenciled on the side of each barrel were the words "Horse Meat" (R. 16, 98). Also attached

to the side of each barrel was a federal government inspection stamp reading (R. 16, 98):

> Domestic Horse Meat or Horse Meat Product
>
> Establishment E-738
>
> The horse meat or meat food product thereof contained herein has been U. S. inspected and passed by Department of Agriculture.
>
> Jamestown Packing Co., Jamestown, North Dakota.

In addition, some of the individual pieces of meat bore this stamp (R. 23, 24).

On July 5, 1950, at about 4:00 P.M., Mr. Raymond L. Sweeney, an Inspector for the Federal Food and Drug Administration, visited petitioners' place of business for the purpose of inspecting their plant (R. 17-18). He talked to petitioner Koemond who granted him permission to inspect the plant and accompanied him on an inspection tour (R. 17-18).

During the inspection tour, Sweeney saw petitioners Klotz and Klarsch and an employee repacking some of the horsemeat which had been received from the Jamestown Packing Company. They were removing the meat from the barrel in which it had arrived, cutting off portions of the meat (including the federal inspection stamp in every case where it appeared on the meat) and repacking it in barrels from which all reference to horsemeat had been removed. (R. 18-19, 23.)

He observed an employee scraping the stenciled words "Horse Meat" from two of the barrels (R. 19).

The inspector also visited the refrigerator room where he saw approximately 30 barrels of horsemeat which had been received from the Jamestown Packing Company and which was still packed and labeled as it was received (R. 19). There were in the refrigerator room five barrels of horsemeat which had been repacked, bearing no label or other identification as horsemeat. All reference to horsemeat had been scraped from the barrels and they were simply labeled "leg shanks," "chucks," "chunks" or "leg chunks." (R. 19-20.) Petitioner Koemond explained to him that they were part of a lot of horsemeat which they had sold to the Lake County Packing Company, Lake Zurich, Illinois, and which they had repacked in accordance with the request of the purchaser. Koemond informed the inspector that the method of repacking was to remove the meat from the barrels, cut portions of it off, and repack it in barrels from which all reference to the word "horsemeat" had been removed. (R. 19-20.)

At the conclusion of this inspection, the inspector told petitioner Koemond that he believed they were repacking the meat in violation of the Food, Drug and Cosmetics Act in three respects, i.e., the barrels did not contain the name and address of the packer or distributor, the meat was not identified as horsemeat, and the labeling employed could be applied to beef (R. 23-24).

The next day, July 6, 1950, Inspector Sweeney again visited petitioners' plant at which time he was informed by petitioners that they had completed repacking and relabeling the Lake County Packing Company order of ten barrels of horsemeat, and that the Lake County Packing Company had picked up the order on the previous evening (R. 26).[1]

Inspector Sweeney then went to the Lake County Packing Company where he found the ten barrels of horsemeat in the firm's cooler. They were labeled as he had observed them at petitioners' plant as "leg shanks," "chucks" or "chunks," without any reference to horsemeat (R. 26-27). The owner of that company told him the meat was beef (R. 33, 36).[2]

Three experts testified that the unqualified terms "chucks" and "chunks" customarily referred to beef (R. 40-41, 45-46, 47-49). One of them also testified that beef and horsemeat have similar physical characteristics and are difficult to distinguish (R. 40).

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[1] Petitioners freely supplied the inspector with information concerning this one particular order of the Lake County Packing Company, its repacking and relabeling, etc. (R. 36), but they denied any knowledge of the Metropolitan Distributing Company which they owned (R. 25). Petitioners also made prior and subsequent sales of horsemeat to the Lake County Packing Company (R. 63-65).

[2] Inspector Sweeney's testimony was generally confirmed by that of petitioners Kocmond and Klotz (R. 53-71). Kocmond claimed, however, that the inspection stamps were not cut off some of the pieces of horsemeat (R. 62). Kocmond also testified that the sale to the Lake County Packing Company was completed, including payment, before they repacked and relabeled the horsemeat (R. 57).

The information charged that petitioners' repacking and relabeling of the horsemeat resulted in its being misbranded in three respects: (1) that the designations which appeared on the barrels were "false and misleading," in that they represented or suggested that the meat was beef, in violation of section 403(a), *supra*, p. 3; (2) that the repacked barrels of horsemeat were food in a package form which failed to bear a label containing the name and place of business of the manufacturer, packer or distributor, in violation of section 403(e)(1), *supra*, p. 4; and (3) that the label failed to bear the common or usual name of the food, i.e., horsemeat, in violation of section 403(i)(1), *supra*, p. 4. The information further charged that the repacking and relabeling of the horsemeat were acts done while the meat was held for sale after shipment in interstate commerce. (R. 5.)

Petitioners were found guilty as charged (R. 106), and each was sentenced to nine months' imprisonment and to pay a fine of $750 (R. 113). No sentence was imposed on the partnerships.

On appeal, the judgment and sentences were unanimously affirmed by the Seventh Circuit (R. 127-132), and a petition for a rehearing was subsequently denied (R. 134).

ARGUMENT

1. Petitioners contend that they were not holding the horsemeat for sale within the meaning of Section 331(k) at the time they repacked and relabeled

it (Pet. 2, 5, 7). This argument is grounded on Kocmond's testimony that the sale of the horsemeat to the Lake County Packing Company had been legally completed before petitioners repacked and relabeled the meat for delivery. As pointed out by the court below (R. 130), however, the language employed in Section 301(k) was not intended to encase the Federal Food, Drug, and Cosmetic Act in the technicalities of personal property sales law. It was intended to maintain the integrity of the labeling of products "to the moment of their delivery to the ultimate consumer" (*United States* v. *Sullivan*, 332 U. S. 689, 696). See also House Report No. 807, 80th Cong., 1st sess.; *United States* v. *Dotterweich*, 320 U. S. 277, 283; *Hipolite Egg Co.* v. *United States*, 220 U. S. 45. It is admitted that petitioners relabeled the horsemeat before they delivered it to the Lake County Packing Company. Certainly the ultimate consumer does not receive full protection if the labels may be removed after the technical sale, but before the food is delivered.[3]

In addition, the jury may properly have concluded that petitioners' sale of the horsemeat to the Lake County Packing Company was not the

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[3] Contrary to petitioners' claim (Pet. 7), the statement in the stipulation (R. 16) that at "the time of shipment [by Jamestown Packing Company] and delivery of said barrels containing horsemeat and while they were held for sale by the K & S Dog Food and Metropolitan Distributing Co., said barrels were labeled as follows: [setting forth the orig-and labeling]," was not intended to foreclose, or relate to the issue as to whether the meat was held for sale at the time it was misbranded.

ultimate sale;[4] for that sale, as petitioners knew, was to a packing company. And, since the packing company subsequently represented that the horsemeat was beef, manifestly it was holding the meat for resale.

2. Petitioners also contend that section 403(e)(1), which requires packaged food to bear the name and address of the manufacturer, packer, or distributor did not apply when they, who were not the original packer or distributor, repacked and redistributed the horsemeat (Pet. 2, 5, 6). The provision is that "a food shall be deemed to be misbranded" if "in package form unless it bears a label containing (1) the name and place of business of the manufacturer, packer, or distributor." As we have shown, the requirements of this provision, as well as the other branding provisions, must be met until the food reaches the ultimate consumer. It is therefore clear that the packaged horsemeat had to bear the name and address of some packer or distributor. Whether petitioners' company or the Jamestown Packing Company, the original packer, is the packer or distributor referred to in this section is not in issue here, for petitioner placed neither name on the barrels of horsemeat which they sold. That the statute required the label to bear the name and address of one or the other cannot be questioned.

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[4] The jury was instructed that the misbranding must have been done "while such food was being held for sale (whether or not the first sale) after shipment in interstate commerce" (R. 94).

In addition, petitioners were charged with misbranding the horsemeat in two other respects, i.e., that the labeling employed was "false and misleading" and that it did not contain the "usual name" of the food. We do not understand petitioners to maintain here that the horsemeat was not misbranded in these respects when they delivered it to the Lake County Packing Company. Thus, even if their contention with respect to section 403(e)(1) were correct, their convictions could be sustained under Sections 403(a) and 403(i)(1).

3. Although petitioners do not maintain that the horsemeat was properly labeled, they contend that they did not violate section 403 because they did not intend to mislead or deceive, and in fact did not mislead, the purchaser of the horsemeat (Pet. 2-3, 6). As the court below pointed out (R. 132), this argument is beside the point. Neither intent to defraud, nor resulting deception, is an element of the regulatory misdemeanor of which petitioners were convicted. *United States* v. *Dotterweich,* 320 U. S. 277, 280-281; *United States* v. *Parfait Powder Puff Co.,* 163 F. 2d 1008 (C.A. 7), certiorari denied, 332 U. S. 851; *United States* v. *Greenbaum,* 138 F. 2d 437 (C. A. 3). If the act of misbranding is accompanied with an "intent to defraud or mislead," the statute makes the offense a felony (Section 303(b), *supra*). It is sufficient for the misdemeanor offense that petitioners intended their act of misbranding; they need not have been aware of any wrongdoing. *United States* v. *Dotterweich, supra.*

4. Petitioners' contention that the decision below is in conflict with Title 9, Chap. 1, Section 17:10, Code of Federal Regulations (Pet. 3, 5, 7), is patently without merit. Section 17:10 provides:

> (a) No Federal inspection marks which have been previously used shall be used again for the identification of any meat or product, except as provided in paragraph (b) of this section.
>
> (b) All stencils, marks, labels, or other devices on previously used containers, whether relating to any meat or product or otherwise, shall be removed or obliterated before such containers are used for any meat or product, unless such stencils, marks, labels, or devices correctly indicate the article to be packed therein and such containers are refilled under the supervision of a division employee.

The obvious purpose of this provision is to prevent misbranding and the avoidance of federal inspection. By no stretch of the imagination can it be construed as authorizing misbranding. Nor did it put petitioners in an untenable position. Either they could have sold the meat in the original packages or, if they desired to repackage it, they could have properly labeled the new packages.

CONCLUSION

There is no merit in any of petitioners' contentions. The decision below is correct and the case presents no conflict of decisions. We respectfully submit that the petition for a writ of certiorari should be denied.

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